IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 366-367

BAY RIDGE OPERATING CO. INC.,

Petitioner,

—vs.—

JAMES AARON, *et al.*

HURON STEVEDORING CORP.,

Petitioner,

—vs.—

LEO BLUE, *et al.*

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF FRANK ADAMS, AS *AMICUS CURIAE*

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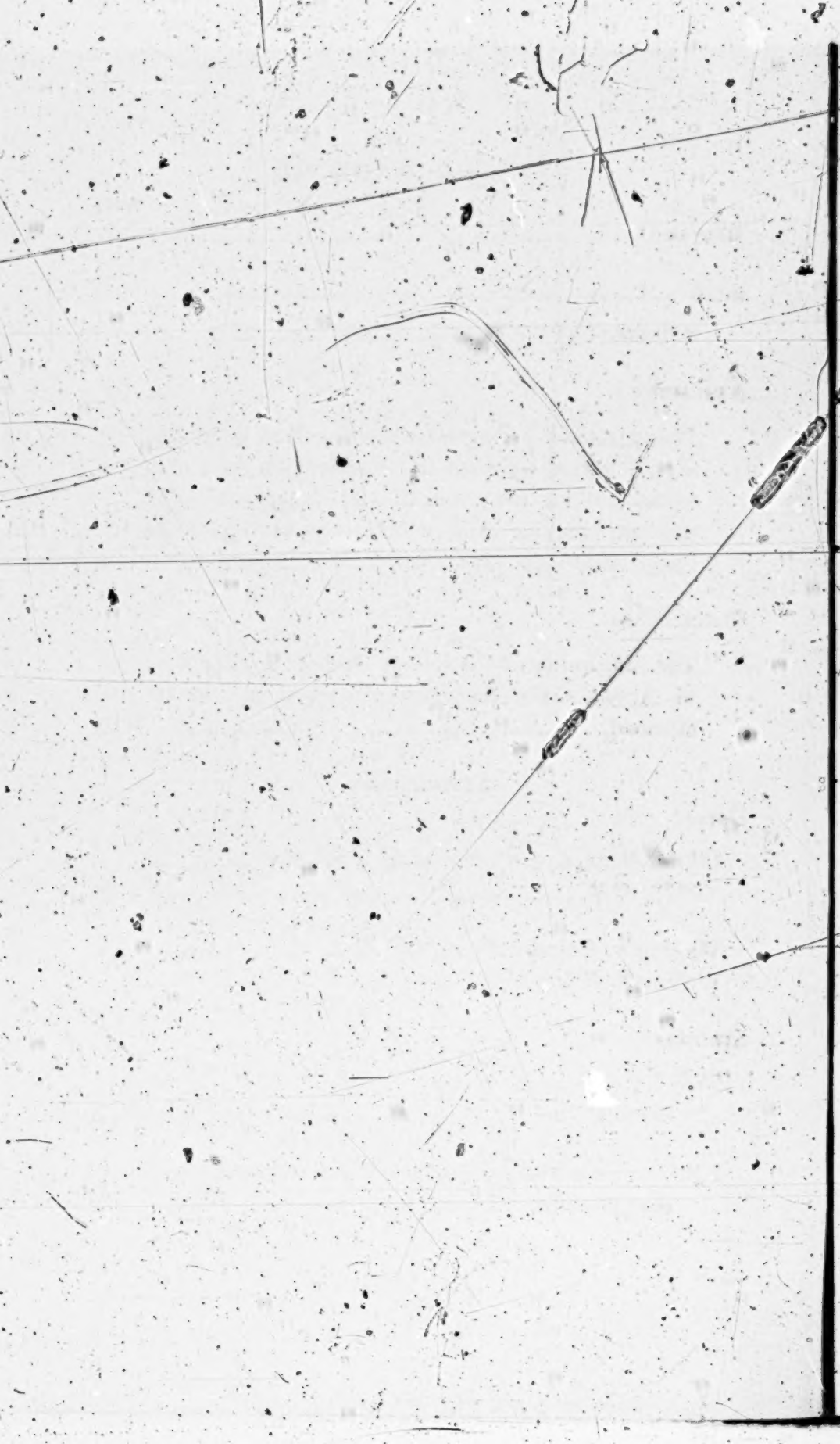

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Motion of Frank Adams for Leave to File Brief as *Amicus Curiae*

FRANK ADAMS respectfully prays leave to file a brief as *amicus curiae* in the above captioned cases. The applicant has in writing requested consent of counsel for petitioner and counsel for respondents.

Consent has not been received from either counsel.

Throughout this motion and briefs, the petitioner shall be referred to as defendants and respondents shall be referred to as plaintiffs.

The applicant is one of approximately 1500 longshoremen in the State of New Jersey who have joined together in several actions now pending in the United States District Court, Southern District of New York against defendants-appellants and other stevedoring companies involving the same questions of fact and law as are involved

in the above captioned cases. He makes this application for leave to file a brief as *amicus curiae* as he believes that the legal question to be decided by this court is of major importance to himself and his fellow longshoremen associated with him in the legal actions which they have filed and which are now pending and which will be affected by the decision of this court in the above captioned cases.

He believes that for the heavy physical labor performed by the longshoremen during the night time, Saturday afternoons and Sundays in excess of 40 hours per week they should be paid one and one half times the regular rate in accordance with the intention and requirements of the Fair Labor Standards Act, and that the employers violated the Act in failing to make said payment.

He believes that the legal question presented in these cases is of major importance to the nation, involving the construction of the Fair Labor Standards Act insofar as it applies to longshoremen in the various ports of the United States.

He believes it to be his public duty to bring before the court the reasons which impel his conclusion that the judgments below should be affirmed.

FRANK ADAMS therefore respectfully requests leave to file a brief as *amicus curiae*.

NATHAN BAKER,
Attorney for Frank Adams, et al.
77 River Street,
Hoboken, N. J.

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BRIEF OF FRANK ADAMS AS *AMICUS CURIAE*

Statement of the Case

The case is before this Court on a *writ of certiorari* granted by this Court to review judgments of the United States Circuit Court of Appeals for the Second Circuit, in actions brought pursuant to the Fair Labor Standards Act.

The plaintiffs are longshoremen who worked in the Port of New York. They contend, and their contention has been upheld by the Circuit Court, that they were not paid one and one half times the regular rate for work in excess of

forty hours in the work week; in violation of the Fair Labor Standards Act.

In pertinent part Section 7a of the Fair Labor Standards Act is as follows:

> "No employer shall • • • employ any of his employees • • • for a workweek longer than forty hours • • • unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed."

The plaintiffs are members of the Longshoremen's Union and the agreement between the Union and the defendant employers in pertinent part, is as follows:

> "a. Straight time rate shall be paid for any work performed from 8 A. M. to 12 Noon and from 1 P. M. to 5 P. M. Monday to Friday, inclusive, and from 8 A. M. to 12 Noon Saturday."

> "b. All other time including meal hours specified herein; shall be considered overtime and shall be paid for at the overtime rates."

It then specified that for general cargo, the straight time rate was $1.25 per hour, and the overtime rate was $1.875 per hour.

Work performed in the time designated in paragraph "a" of the Union agreement is done during regular and convenient hours during the day time and Saturday mornings.

Work performed in the time designated in paragraph "b" of the Union agreement is dangerous and inconvenient. It is dangerous because performed at night under artificial light which tends to tire the men quickly. It is

difficult because observation is seriously impeded by inability to illuminate the entire work area at all times. It is inconvenient because the traditional working hours are in the daytime and during week days; working on Saturday afternoons, Sundays and at night obviously sets a man apart from his fellow workers in other industries, and necessarily curtails his family relationship, his relaxation periods and all the normal activities of living. The work involves heavy, physical labor. A man literally earns his pay by the sweat of his brow.

The Union agreement therefore established two rates of pay: one rate of $1.25 per hour for the regular and convenient hours by paragraph "a", and another rate of $1.875 per hour for the inconvenient and dangerous hours by paragraph "b".

ARGUMENT

The rate paid to longshoremen for work done during the period specified as "overtime" in the Union agreement for inconvenient and dangerous hours was the "regular rate" within the purview of the Fair Labor Standards Act.

The entire case revolves itself around the meaning of the word "overtime" in the Union agreement, and the meaning of "regular rate" in sec. 7a of the Fair Labor Standards Act.

From the debates in Congress, it appears that the rationale behind the Act with reference to hours was not to prohibit a workweek in excess of forty hours, but rather to put a penalty on an employer who worked his men in excess of forty hours per week by requiring him to pay his employee, one and one half times the regular rate for time worked in excess of forty hours.

In 83 Congressional Record, Part 8, p. 9177, col. 1, there is the following statement by Senator Walsh,

> "Q. Does this mean that under no circumstances can any industry work its employees more than forty hours? A. No. Industries may work their employees more than forty hours * * * but it must pay the employees for overtime at the rate of one and one half times the regular pay of its employees."

The Union agreement refers to pay for certain times as "straight time rate," for other times as "overtime rate". It is submitted that by calling gasoline water, gasoline is not thereby made into water. By calling work overtime, does not thereby make it overtime work within the meaning and intent of the Fair Labor Standards Act. What the Union agreement accomplished was merely to establish two rates of pay; one rate for regular and convenient hours, and another rate for inconvenient and dangerous hours. The term "overtime" as used in the agreement has no connection whatever with the *number* of hours worked, it is descriptive of the time of day not with the quantity of time. This is perfectly clear when one considers the fact that it is possible for a man to work more than forty hours per week in the "overtime" bracket without even working a single hour in the "straight time" bracket. And again a man may work one hour in the "straight time" bracket and receive $1.25, and then on the same day he may work an hour in the "overtime" bracket and receive one and one half times as much—$1.875. Patently, this is merely two rates of pay for work performed at diverse intervals of time; and no penalty is imposed for working a man over forty hours in a week. Both rates were the "regular rates" for work done during the respective periods specified.

The intent of Congress, as appears from the debates, is to place a penalty on employers who work their employees over 40 hours in the workweek by paying one and

one half times the "regular rate". Although many definitions of the word "regular" is to be found in the dictionary, the definition which most accords with its common, ordinary meaning and usage and as intended by Congress is as follows:

> "constituted, selected, conducted, etc. in conformity with established usages, rules or discipline." (Webster's Dictionary.)
>
> "The purpose and subject matter of a statute necessarily determine or control the meaning of the words used in it. • • •. But words of common usage should be given their usual, ordinary and natural meaning or signification, according to approved usage unless there is some indication contrary in the statute itself. The sense in which the words in question are used in every day life rather than their scientific meaning is the criterion to use in ascertaining the meaning. And it is to be presumed that the legislature has used the words in their known and ordinary signification. • • • Similarly, where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted even though the ordinary meaning of the word is thereby enlarged or restricted, and especially in order to avoid absurdity or to prevent injustice • • •" Crawford, *Statutory Construction* (1940), sec. 186, p. 315.

Also see

> 2 Sutherland, *Statutory Construction* (3rd ed. 1943), sec. 4919.

On many prior occasions, the Supreme Court of the United States has defined the terms "regular rate" in the Fair Labor Standards Act.

Chief Justice Vinson in *149 Madison Ave. Corporation* v. *Asselta*, 67 S. Ct. 1178, 1181 defines it thusly,

> "The regular rate is thus an 'actual fact' and in testing the validity of a wage agreement the courts are required to look beyond that which the parties purported to do."

In the cases at bar, it is patent that the "actual fact" is that there was one rate of pay for certain designated intervals of time; and another rate of pay for other designated intervals of time. And hence, the Union agreement, although talking of "overtime", in reality made no provision for time worked in excess of forty hours per week.

In two earlier Supreme Court cases, the same thought was expressed.

In *Walling* v. *Helmrich & Payne, Inc.*, 323 U. S. 37, 40, it was said,

> "While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime work-week."

And again in *Walling* v. *Harnischfeger*, 325 U. S. 427, it appears,

> "No contract designation of the base rate as the 'regular rate' can negative the fact that these employees do in fact regularly receive the higher rate."

Certainly, in the cases at bar, the men regularly received the higher rate designated in the Agreement as "overtime" when they worked in the times set forth in the "overtime" bracket. Merely calling these hours "overtime" do not make them hours in excess of forty hours within the purview of the Act.

Therefore, from lay, legislative, and judicial interpretation of the words "regular rate" it appears that the plaintiffs were not compensated for work performed in excess of forty hours in the work week, in compliance with the Fair Labor Standards Act. Rather there was a clever and subtle attempt to delude them into believing that they were receiving overtime for work performed in excess of forty hours in the work week by designating one rate of pay as straight time and another higher rate of pay as overtime. What they were really getting the higher rate for was not extra and additional compensation within the meaning of the Act, for work performed in excess of forty hours in the workweek, but for dangerous and inconvenient hours at designated times, irrespective of whether it was work performed less than or in excess of forty hours in workweek. This attempt by the employers of the longshoremen to subvert the will of Congress expressed by the Fair Labor Standards Act should not be sanctioned by this court.

It is respectfully submitted that the higher rate specified in section (b) of the Union Agreement for the work done during the periods specified as "overtime" was actually for inconvenient and dangerous hours and was the "regular rate" for that period, and for work in excess of 40 hours in the work week plaintiffs were entitled to one and one half times the "regular rate" pursuant to the Fair Labor Standards Act.

CONCLUSION

The judgments of the United States Circuit Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

NATHAN BAKER

On the Brief

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BENJAMIN H. SIFF
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